

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Thursday, September 11, 2008
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Tom Fischer, Chairman, called the meeting to order at 9:00 a.m. Senator Fischer requested a moment of silence in memory of the victims of the terrorist attacks of September 11, 2001.

Members present: Senators Tom Fischer, John M. Andrist, Layton W. Freborg, Jerry Klein, Tracy Potter; Representatives David Drovdal, Mary Ekstrom, Rodney J. Froelich, Chris Griffin, Louise Potter, Dwight Wrangham

Members absent: Representatives Randy Boehning, Chuck Damschen, Duane L. DeKrey, Kim Koppelman, Jon Nelson, Blair Thoreson

Others present: See [Appendix A](#)

It was moved by Representative Drovdal, seconded by Representative Ekstrom, and carried on a voice vote to approve the minutes of the June 11, 2008, meeting of the committee.

DEPARTMENT OF FINANCIAL INSTITUTIONS

Chairman Fischer called on Mr. Robert J. Entringer, Assistant Commissioner, Department of Financial Institutions, for testimony ([Appendix B](#)) relating to October 2008 rules of the department.

Representative Drovdal said it appears the Department of Financial Institutions is following the federal lead in the area of mortgage lending by credit unions. He said with the recent problems that have come to light regarding home mortgage defaults, he questions whether North Dakota should follow the federal lead. Mr. Entringer said the rule adopted by the department reduces the required equity in a mortgage loan from 35 percent to 25 percent. He said that is the federal standard and that change would allow credit unions to be competitive in mortgage lending. He said the national problems that have come to light with mortgages generally relate to lenders requiring little or no equity for a borrower. He said the secondary mortgage market standards have been raised substantially on the national level and that will help to eliminate the exotic mortgages that were being created which got lenders into problems on a national level.

Mr. Greg Tschider, Mid-America Credit Union Association, said the problems that have surfaced nationally with mortgage lending have been due to loans of 100 percent or even up to 125 percent of property equity. He said some of the lending problems that have occurred nationally are due to a

lack of diligence by lenders. He said for example, illegal aliens have been able to get mortgage loans because lenders did no background checks.

Representative Drovdal asked how a lender maintains no more than 90 percent equity in a property if home values suddenly fall. Mr. Tschider said it is a judgment that must be made by lenders regarding the strength of local property values. He said lenders cannot anticipate a huge decline in market values. In response to another question from Representative Drovdal, Mr. Tschider said North Dakota has an antideficiency law, which means the borrower can just walk away from the home loan and the lender has no recourse against the borrower individually and is limited to the option of taking possession of the home. He said this makes lenders cautious about overvaluing property. He said the other option in these situations is renegotiation between the borrower and the lender.

GEOLOGICAL SURVEY

Chairman Fischer called on Mr. Ed Murphy, State Geologist, Geological Survey, for testimony ([Appendix C](#)) relating to subsurface minerals and uranium mining rules adopted by the Industrial Commission. In addition to reviewing his written testimony, he presented PowerPoint illustrations to show how in situ leach uranium mining is done.

Representative Froelich asked what the financial benefit is to a mineral owner and a surface owner of allowing uranium mining. Mr. Murphy said the way in situ leach uranium mining is conducted means that a mining operation can cover a large area. He said there would be leasing fees and royalty payments to mineral owners, but he is not certain how much those payments would be. He said there also would be payments to a surface owner because the casings would be a surface obstruction over a substantial area.

Representative Ekstrom asked whether there are significant security issues and requirements for safeguarding the yellowcake uranium produced from these operations. Mr. Murphy said in the operation he has seen, fencing is used around areas where uranium is stored. He said he believes there is someone onsite at all hours. Representative Ekstrom asked whether background checks are done on employees of uranium mining facilities. Mr. Murphy said he is not certain and the federal Nuclear

Regulatory Commission and Federal Energy Regulatory Commission may have security and employee screening rules for these facilities.

Senator Potter asked whether the uranium mining operation disturbs uranium within an aquifer to an extent that would make the aquifer unusable. Mr. Murphy said an aquifer where uranium mining occurs already contains uranium so it is not a question of contaminating usable drinking water. He said the mining operation does result in a higher level of uranium content distributed within the aquifer from the extraction process.

Representative Griffin asked whether uranium mining presents a risk of contaminating another aquifer. Mr. Murphy said there should not be a significant mining impact to aquifers above or below the aquifer that already bears uranium content.

Representative Potter asked how the rules adopted by the Industrial Commission compare to rules in Nebraska and other states where uranium mining takes place. Mr. Murphy said the rules adopted are modeled after South Dakota rules. He said the Geological Survey also looked at rules in place in Nebraska, Colorado, Wyoming, Texas, and other states. He said South Dakota appeared to have the most restrictive rules and that is why South Dakota was used as a model.

LABOR DEPARTMENT

Chairman Fischer called on Ms. Lisa Fair McEvers, Labor Commissioner, for testimony ([Appendix D](#)) relating to rules regarding investigating claims of discrimination under the North Dakota Human Rights Act.

DEPARTMENT OF HUMAN SERVICES

Chairman Fischer called on Ms. Julie Leer, Department of Human Services, for testimony ([Appendix E](#)) relating to child support guidelines rules adopted by the department.

Representative Froelich said he read a newspaper article stating that driver's licenses are suspended for failure to pay child support. He inquired how accurate the news article was in describing the enforcement. Mr. Jim Fleming, Department of Human Services, said driver's license suspension is not a common method of enforcing payment of arrearages on child support. He said a driver's license can be suspended if the obligor is two months or \$2,000 behind in payments. He said 2003 legislation authorized suspending driver's licenses and hunting and fishing licenses. He said driver's license suspension is used as an enforcement mechanism only in instances when the obligor is noncooperative. He said if the obligor contacts the department to negotiate a payment plan, the department will lift the driver's license suspension.

Representative Ekstrom asked for an estimate of the current amount of child support arrearages. Mr. Fleming said he does not have an exact amount

but the amount of arrearages exceeds \$225 million statewide.

Representative Drovdal asked how many driver's licenses the department is holding in suspension. Mr. Fleming said he does not have statistics available. He said the department will generally use suspension of hunting and fishing privileges before suspension of driving privileges.

Senator Fischer said the rules make a change to the use of statewide average earnings in imputing income based on earning capacity of obligors. He said he does not like the use of imputed income if the department believes a person has changed jobs to avoid paying child support. Mr. Fleming said imputed income is used in certain circumstances and there are three benchmarks provided by rule to determine the amount of imputed income. He said the benchmarks are based on the federal minimum wage, statewide average earnings for comparable employment, and a percentage of the obligor's greatest average gross monthly earnings. He said the statewide average earnings is a new measurement, which replaces the use of prevailing gross earnings in the community. He said there is no source to use for determining prevailing gross earnings in the community. He said the statewide average earnings is a standard that can be determined. He said the benchmark based on the obligor's earnings has been reduced to look back at earnings over a period of 24 months, rather than the 36 months under the previous rule.

Ms. Leer presented a request ([Appendix F](#)) for an extension of time to create administrative rules regarding transition assistance.

Ms. Leer said a hearing on several rules proposed by the department will be held on September 22, 2008. She said part of the hearing will involve the rule regarding transition assistance. She said if the request for an extension of time is not approved, the department will withdraw the transition assistance rule from consideration.

Chairman Fischer said he is not sure if there is a consequence to whether the committee approves the request for an extension of time. Representative Froelich said we are nearing a legislative session and it may be appropriate to bring a bill forward for consideration.

It was moved by Representative Drovdal, seconded by Senator Andrist, and carried on a roll call vote that the committee approve the request of the Department of Human Services for an extension of time to adopt rules relating to transition assistance. Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Drovdal, Ekstrom, Froelich, Griffin, Potter, and Wrangham. No negative votes were cast.

PUBLIC SERVICE COMMISSION

Chairman Fischer called on Ms. Susan Wefald, President, Public Service Commission, for testimony ([Appendix G](#)) relating to wind turbine

decommissioning rules adopted by the Public Service Commission and carried over for consideration from the June 11, 2008, committee meeting.

Senator Fischer asked whether the company required to remove the wind turbine and fixtures would be required to remove any preexisting cables on the site. Mr. Jerry Lein, Public Service Commission, said nothing he knows of in the rules would require removal of preexisting cables.

GEOLOGICAL SURVEY

Senator Potter said he would like to have more time to review the rules adopted by the Geological Survey. He said he does not have any specific problem with the rules and would just like more time to study the rules. **It was moved by Senator Potter and seconded by Representative Ekstrom that the rules of the Geological Survey be carried over for consideration at the next committee meeting.**

Representative Wrangham asked Mr. Murphy if there would be any adverse effect of holding over the rules. Mr. Murphy said a delay would not cause problems for any existing operators as far as he knows. **The motion carried on a roll call vote.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Drovdal, Ekstrom, Froelich, Griffin, Potter, and Wrangham. No negative votes were cast.

RACING COMMISSION

Chairman Fischer called on Mr. Gordy Smith, State Auditor's office, for presentation of an audit report ([Appendix H](#)) for the Racing Commission. Mr. Smith reviewed the contents of the report. He said the specific recommendations made by the State Auditor's office begin on page 12 of the report. He said the State Auditor's office has offered to make its staff available to the Racing Commission to assist in implementation of the recommendations made in the audit report.

Chairman Fischer called on Mr. H. Patrick Weir, Chairman, Racing Commission, for comments on the functions of the Racing Commission. Mr. Weir said Racing Commission members attended the Legislative Audit and Fiscal Review Committee meeting in June for the presentation of the audit report on the Racing Commission. He said the commissioners felt the audit report was very thorough and fair. He said at that meeting he promised the chairman of the Legislative Audit and Fiscal Review Committee that the Racing Commission would proceed promptly to implement the recommendations in the audit report and that has been done. He said the commission has voted on each recommendation and each was approved.

Mr. Weir said the Racing Commission was under the impression it had legal authority to supplement purses from the breeders' fund. He said that impression may have been legally correct based upon statutory language but the Racing Commission has

reversed its position on the issue. He said it has become clear to commission members that although the statutory language appears to allow payments for racing purses from the breeders' fund, it does not appear legislators support those payments. He said the Racing Commission will not use breeders' fund money to supplement purses. He said the statute in question probably should be cleared up during the next legislative session.

Mr. Weir said Racing Commission member Mr. Tom Secrest moved to return purse money to the breeders' fund to the extent it came from the breeders' fund. Some of the funds were paid out at the Belcourt Track and the commission decided it could not take back those funds but the commission approved the return of the remainder.

Mr. Weir said the Racing Commission has gotten the message loud and clear that the racing industry has problems. He said Racing Commission members are committed to improving the industry to serve the needs of horsemen, bettors, and the public and to meet the commission's fiduciary responsibilities.

Representative Froelich asked whether it is possible to stay on top of the racing industry. Mr. Weir said it is remarkably complex and challenging to monitor and administer the racing industry. He said the Racing Commission needs information from the tote company as recommended by the State Auditor. He said the Racing Commission intends to comply with the auditor's recommendations to improve its administration of racing.

Representative Froelich asked whether it would be more appropriate for the Gaming Commission or another entity to administer the gambling aspect of racing and to have the Racing Commission administer only the racing aspects. Mr. Weir said that proposal has some appeal but the input of the breeding and racing industry participants would be missing from the gambling administration.

Representative Froelich said he has been informed that the Racing Commission refuses to listen to arguments presented by horsemen in administering the racing industry. Mr. Weir said that situation must be stopped to the extent it exists. He said he believes the current commission members will make every effort to consider all aspects and opinions of the racing industry.

Chairman Fischer called on committee counsel to review two bill drafts relating to the Racing Commission. Committee counsel said one bill draft [\[90152.0100\]](#) would eliminate the Racing Commission and transfer its functions to the Attorney General's office. He said the other bill draft [\[90153.0100\]](#) would require return of breeders' fund money from the purse fund to replace money paid from the breeders' fund for purses during the period from July 1, 2007, through July 31, 2009.

Representative Froelich said he would like to see these bill drafts moved forward for legislative consideration. Chairman Fischer said any legislator could introduce these bills for consideration.

Representative Froelich said he would favor legislation to move gaming issues of racing under the jurisdiction of the Attorney General.

Senator Klein said he believes individual legislators will bring legislation forward to eliminate or restructure the Racing Commission if this committee does not approve these bill drafts.

Representative Drovdal said he was ready to support the bills but the testimony at the meeting today makes him believe it would be more appropriate for individuals to propose legislation than for the Administrative Rules Committee to do so.

It was moved by Representative Froelich, seconded by Representative Ekstrom, and failed on a roll call vote that the Administrative Rules Committee approve and recommend to the Legislative Council the bill drafts to eliminate the Racing Commission and to require return of certain breeders' fund money. Voting in favor of the motion were Senator Andrist and Representatives Ekstrom, Froelich, Griffin, and Wrangham. Voting in opposition to the motion were Senators Fischer, Klein, and Potter and Representatives Drovdal and Potter.

HUMAN RESOURCE MANAGEMENT SERVICES

Chairman Fischer called on Ms. Laurie Sterioti Hammeren, Director, Human Resource Management Services, Office of Management and Budget, for testimony ([Appendix I](#)) relating to rules carried over for consideration from the June 11 committee meeting regarding county social services merit systems. Ms. Sterioti Hammeren said the rules were carried over pending receipt of an opinion from the Attorney General on the rules as they apply to Cass County. She said the Attorney General's office declined to issue an opinion on the issue. A copy of the letter from the Attorney General's office is attached to her testimony.

Senator Fischer asked whether the board of county commissioners could hire independent contractors to perform functions in certain county programs and have those contractors serve on an at-will status. Ms. Sterioti Hammeren said that would not comply with federal standards because federal standards that apply to programs receiving federal funding require employees to be members of a personnel system. Senator Fischer requested Ms. Sterioti Hammeren to provide him a copy of the applicable federal standards.

Chairman Fischer called on Ms. Jodee Buhr, Executive Director, North Dakota Public Employees Association, for comments on the rules adopted by the Office of Management and Budget. Ms. Buhr said the North Dakota Public Employees Association supports the rules as adopted by Human Resource Management Services because the association believes the rules follow the intent of the legislation the rules were adopted to implement. She said she

does not believe the legislation was intended to establish at-will status for county personnel systems.

GEOLOGICAL SURVEY

Chairman Fischer called on Mr. Lynn Helms, Director, Department of Mineral Resources, for comments relating to the Geological Survey rules. Mr. Helms said carrying over the rules of the Geological Survey would not cause problems except with regard to North Dakota Administrative Code Section 43-02-02-11 relating to bonding requirements. He said this rule is not included in the uranium mining rules and the rule received very positive comments during hearings. He said he would appreciate the committee allowing that rule to become effective October 1.

It was moved by Senator Potter, seconded by Representative Ekstrom, and carried on a voice vote that the committee reconsider its action to carry over the rules of the Geological Survey.

It was moved by Senator Potter, seconded by Senator Ekstrom, and carried on a roll call vote that the committee carry over consideration of the rules of the Geological Survey relating to in situ leach uranium mining contained in North Dakota Administrative Code Chapter 43-02-02.2. Voting in favor of the motion were Senators Fischer, Andrist, Klein, and Potter and Representatives Drovdal, Ekstrom, Froelich, Griffin, Potter, and Wrangham. No negative votes were cast.

RULEMAKING STATISTICS

Chairman Fischer called on committee counsel for a presentation of a memorandum entitled [Administrative Rulemaking Statistics 2007-08](#). Committee counsel said a memorandum is prepared before the Administrative Rules Committee report to the Legislative Council during each interim. He said the report is a compilation of statistics on the number of rules reviewed by the committee. He said during the most recent two years there has been a significant decline in the number of sections of administrative rules amended, created, or repealed and a substantial reduction in the number of pages of those rules reviewed by the committee. He said the table attached to the memorandum shows the statistics for each administrative agency that has done administrative rulemaking in this two-year cycle.

COMMITTEE DISCUSSION

It was moved by Senator Andrist, seconded by Senator Klein, and carried on a roll call vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill draft recommended by the committee and to present the report and recommended bill draft to the Legislative Council. Voting in favor of the motion were Senators Fischer, Andrist, Klein, and Potter and Representatives Drovdal, Ekstrom, Griffin, Potter, and Wrangham. No negative votes were cast.

Committee counsel said interim committees of the Legislative Council adjourn sine die at the time of recommending a report to the Legislative Council. He said the Administrative Rules Committee does not adjourn sine die and will meet in December.

Chairman Fischer thanked all of the members of the committee for their service during the interim.

No further business appearing, Chairman Fischer adjourned the meeting at 1:00 p.m.

John Walstad
Code Revisor

ATTACH:9